

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of the Fair Hearing Request of:

CLAIMANT,

vs.

REGIONAL CENTER OF ORANGE COUNTY,

Service Agency.

OAH No. 2023020237

DECISION

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on April 17, 2023, and when not completed that day, the hearing continued on May 1, 2023. The hearing was conducted by video conference.

Claimant did not appear, but was represented by his Mother, who was assisted by Claimant's Uncle. (Family names are not used in the interest of privacy.) Regional Center of Orange County (RCOC or Service Agency) was represented by Paula Gray, Manager of Fair Hearings.

Bellamy Calderon, Alex Diaz, and Gillian Gomez, served as interpreters, translating English into Spanish and vice-versa, to assist Mother.

Documentary and testimonial evidence was received. The record closed on May 1, 2023.

The ALJ hereby makes his factual findings, legal conclusions, and order.

ISSUES PRESENTED

The issue is whether the Service Agency should be ordered to provide services for Claimant as follows: seven hours per week of personal assistance services; seven hours per week of personal trainer services; and social recreation services at Orange County Children's Therapeutic Arts Center (OCCTAC).

SUMMARY OF CONTENTIONS

Claimant is a boy who suffers from Autism Spectrum Disorder (ASD) and has speech and language difficulties. He will start middle school in August 2023. His Mother asserts that he has significant deficits in his social skills, which leads to problems with his peers; the nuances of social interaction escape him. For example, his Mother attests Claimant doesn't understand sarcasm. Some of his peers reportedly bully him, and some take advantage of him. Further, he is also significantly overweight. Mother wants the Service Agency to fund for a person who can go out with Claimant into the community and help him learn to interact in the community. She asks for funding for a personal trainer, to teach Claimant how to exercise, to help control his weight. A program at OCCTAC would further help him with socialization.

The Service Agency contended that Claimant must first look to generic services, and it points to the rule that it must consider typical parental responsibility, which in this case would mean Mother would have to provide services. For example, RCOC contends all parents are responsible for their children's participation in activities such as sports, art, or dance. The Service Agency acknowledges that some of Claimant's behaviors, especially eloping, may support a request for an assistant, but at hearing it contended such a person would need to have training in managing challenging behaviors, and that personal assistants don't have such training. Service Agency has not been able to assess Claimant's behavioral issues. RCOC is willing to fund one social recreational activity per week through OCCTAC, but not two or three programs. As to a personal trainer, Service Agency does not believe the need was established, and contends such services are not the types of specialized services authorized by law or its service policies.

EVIDENCE RELIED ON

In reaching a decision in this case the ALJ considered and relied on Exhibits RC 1-19, and Z-1; Exhibits CL 1-32, and the testimony of Christina Genter, Carrie Otto, Peter Himber, M.D., Theresa Carlisle, Mother, and Uncle.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Claimant is a 12-year-old boy who receives services from RCOC under the Lanterman Developmental Disabilities Services Act (Lanterman Act or the Act), California Welfare and Institutions Code, section 4500 et seq. (All statutory references

are to the Welfare and Institutions Code, unless otherwise noted.) He is eligible for services because he has ASD, an eligible condition under the Act.

2. Mother requested funding for the services identified above. On January 10, 2023, RCOC issued a Notice of Proposed Action (NOPA) denying funding for seven hours per week of personal assistance services, seven hours per week of personal training, and recreation services at OCCTAC. The NOPA form was accompanied by a letter of the same date, further explaining the Service Agency's action. (Ex. RC 3, pp. A7-A9 [English language version].)

3. Mother submitted a Fair Hearing Request dated January 16, 2023, and it was received by RCOC the next day. (Ex. RC 1; Ex RC 17, p. A370.)

4. This proceeding resulted, all jurisdictional requirements having been met.

Claimant's Background

5. Claimant lives with his mother within the Service Agency's catchment area. His parents are separated, his father moving from the family residence a few months before the Fair Hearing took place. Father reportedly sees Claimant on Sundays. Claimant has no siblings.

6. Claimant was diagnosed with ASD when three years old. He has speech and language impairments sufficient to support special education services from his school district. According to a letter from his primary care physician, he also suffers from Generalized Anxiety, Sensory Integration Disorder, and Intellectual Disability. (Ex. CL 31.) In April 2023, a Developmental-Behavioral Pediatrician with the Center for Autism and Neurodevelopmental Disorders at UC Irvine wrote that Claimant has been diagnosed with ASD, Cerebral Dysfunction, and Childhood Obesity. (Ex. CL 25.) The

details of the diagnoses asserted by the two physicians are not provided in their letters. According to his primary care doctor, Claimant weighs 203 pounds. (Ex. CL 31.) He is approximately five feet, two inches tall.

7. As to possible Intellectual Disability, such diagnosis is not found in the school district Individual Education Plans (IEP's) or any Individual Program Plan (IPP) developed with the Service Agency. Claimant's school district tested Claimant's cognitive abilities in October 2021, using some of the subtests of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), a standard IQ test, and the Kaufman Assessment Battery for Children, Second Edition (KABC-II). No full-scale IQ was reported, but on the six WISC-V subtests that were administered, scores on four were in the Well Below Average range, and the other two were Below Average. Similar scores were obtained on parts of the KABC-II, though more were Below Average. (Ex. 14, pp. B266-B270.)

8. Claimant is in the sixth grade and starts middle school in August. He receives special education services based on his ASD, and he is also eligible for special education services because of Speech or Language Impairment. (Ex. CL 13, p. B115) One of his IEPs states that Claimant "exhibits delays in the area of syntax/morphology, semantics, and pragmatics." (Ex. RC 7, p. A45.) Among his special education support services are "title I," RSP, and Speech/Language. According to a recent report card, Claimant is below grade level in math and reading. (Ex. CL 10, p. B85.)

Services Received by Claimant

9. The Service Agency provides 24 hours per month of regular respite care, and another 56 hours per month of exception respite, the latter in response to Mother's medical problems. Claimant's grandmother provides some of the regular

respite care, and Uncle provides the other respite care. Service Agency funds water safety training (swim lessons) once per week, at a cost of \$20 per lesson. It is providing a personal safety assessment with a firm known as Get Safe, and parent mentor services. The latter are designed to educate Mother about finding generic resources and training her to advocate for Claimant at home and in the school community, apparently for 20 hours per month. (Ex. RC 17, p. A362.)

10. Aside from the special education services provided to Claimant, he receives speech, physical, and occupational therapies through Medi-Cal. In-Home Supportive Services (IHSS) are provided 259 hours per month, with Mother as the IHSS worker. During 2022, RCOC funded a 16-week program intended to increase Claimant's social skills, known as the PEERS social skills training class; the course, designed at UCLA, was provided by Social Skills Development Center. (Ex. CL 24.)

11. Claimant has previously received behavioral interventions, funded by Medi-Cal. During the December 2022 IPP meeting, it was reported that those services had been placed on hold for "a couple months due to no staff availability." (Ex. RC 6, p. A34.) In February and March 2023, Claimant was assessed for further behavioral services by a new provider, Aba Your Way, LLC. The Board Certified Behavior Analyst (BCBA) who performed the assessment recommended further Applied Behavior Analysis Treatment (ABA treatment). She recommended 32 hours of direct treatment per month, 10 hours per month of supervision, 8 hours per month home care training, and 12 hours per month of social skills group. This is apparently more than the prior firm provided. The services recently recommended have yet to be obtained by Claimant. They would have to be funded by Medi-Cal/CalOptima (CalOptima), an insurance program. The Service Agency's BCBA gave her opinion that the recommendations for the more intensive program would be approved by CalOptima.

12. Mother has declined to share information about Supplemental Security Income (SSI). (Ex. RC 6, p. A24.)

Claimant's Behaviors and Deficits

13. Mother reported, during a December 2022 IPP meeting, that Claimant is a selective eater, with a high sensitivity to food odor, taste, and textures, and he appears lactose intolerant. He will grab snacks from the refrigerator when not supervised; Uncle testified that at one point they put a lock on the refrigerator door.

14. Mother reported further about Claimant's behavior in the December 2022 IPP meeting, stating his attention span had decreased, and negative behaviors increased, making it difficult to redirect him. She reported he engaged in stimming behaviors, and he needed verbal reminders to use complete sentences; he tends to use five- and six- word phrases. Claimant needs help with activities of daily living, and he was described as requiring a lot of motivation and supports from people with patience. When closed off he may display self-injurious behaviors or elopement. (Ex. RC 6, p. A24.) At another point, it was reported that Claimant would elope "any opportunity he gets." (Ex. RC 6, p. A27.)

15. Mother reported to the IPP team that Claimant needs help toileting, and he has wetting accidents two or three times per week. She has to help him wipe himself after a bowel movement, and daytime wetting accidents often result from him waiting too long to toilet. Other activities of daily living must be supported, including putting on clothing, teeth brushing, and showering, all of which involve efforts and attention from Mother. Some of the problems result from Claimant's poor fine motor skills.

16. The December 2022 IPP document describes behavioral challenges reported by Mother; she reported concerns had increased since the Covid-19 pandemic started. Claimant was described as easily triggered and engaging in non-compliance, tantrums, physical aggression, elopement, property destruction and self-injurious behaviors. Claimant engages in falling to the floor, hitting, biting, and kicking; he often channels this behavior at his mother, especially when denied access to a desired item or re-directed to a non-preferred activity. Such behaviors were reported as occurring daily. (Ex. RC 6, p. A34.)

17. The behaviors described above have been communicated by Mother to ABA or potential ABA providers. (Ex. CL 22, p. B378; Ex. RC Ex. 8, p. A189.) However, it is noteworthy that during an observation by a BCBA at Claimant's school in approximately February 2023, maladaptive behaviors of the type described by Mother were not observed. (See CL Ex. 22, p. B379.)

18. The worst of the behaviors described above have not been described as occurring in the community, at least with the intensity seen at home. Mother and Uncle report some eloping, or attempts at it, in the community. Mother related that Claimant wouldn't wait in a line during a recent outing. A family friend testified how Claimant, when at the trampolines (an activity he enjoys), would tend to go off on his own, instead of interacting with others his age.

19. Claimant introduced a letter from his basketball coach, who has been the coach for two seasons. The coach noted Claimant has a generally positive attitude with the coach. He went on to write: "however, he has a difficult time following instructions and his motor skills and hand-eye coordination appear to be less developed than his peers. He also has some difficulty socializing with teammates as he will make

comments that they interpret negatively.” The observations were limited to basketball outside of school. (Ex. CL 27.)

20. An ID note in Claimant’s chart at RCOC described an intake assessment from Get Safe, which will provide some training for Claimant. According to the note, it was reported “Claimant seemed to require constant repetition/redirection when asked questions as he appeared to become distracted often. . . . Intake assessment indicates that continuous services may be beneficial to ensure retention of material as [Claimant] appeared to require constant redirection/repetition.” (Ex RC 17, p. A360.)

Service Agency Evidence

21. Witnesses for RCOC testified that personal assistants are typically used to support adults in day programs. However, the Service Agency’s Purchase of Service Guidelines also provide for personal assistants to work with a child in a day care or after school program, where there are needs for assistance to allow the child to continue in the program. (Ex. RC 16, p. A321.) When the ALJ noted that some regional centers may provide a personal assistant as an extra set of hands, perhaps to help physically manage a large child, Ms. Otto testified such a role is treated as respite care at RCOC.

22. The issue of using a respite worker for the personal assistant Mother envisions is complicated by the Service Agency’s view that a person untrained in managing problem behaviors like eloping should not take on the role. RCOC believes that a behavioral respite worker would have to be found, that is, a respite worker with training in managing consumers with problem behaviors. But it would need to conduct a behavioral assessment, and Mother has refused to allow the Service Agency to

conduct a behavioral assessment. It is fairly inferred that the activities of such a worker would have to be coordinated, so some extent, with providers of ABA Therapy.

23. In a letter dated April 5, 2023, Claimant's primary care doctor noted that Claimant has problems with social cues and social interactions. He stated that he would "recommend ABA Therapy through Regional Center focusing on his social skills. In particular, therapy that focuses on his mental processing of social cues and specific individual interactions." (Ex. CL 26.) In a later and more detailed letter, Claimant's physician advocates for the personal assistant and personal trainer sought by Claimant.

24. As to a personal trainer, Dr. Himber testified that there are other ways to provide exercise for Claimant. He testified that sports organizations have sprung up to work with autistic children, and such should be considered. He noted that Claimant's primary care doctor had previously recommended basic exercise and diet control to manage Claimant's weight. (See CL Ex. 17, p. B359.) Dr. Himber does not believe that Claimant should be working out on exercise equipment. He spoke favorably of swimming, and believes karate or dance would help with exercise, while providing socialization opportunities.

25. Service Agency provided evidence that information has not always been forthcoming from Claimant's mother. As noted, she has denied an assessment for ABA Therapy, and she would not advise the Service Agency on SSI funding, if any. Current IEP documents were not provided until just before the hearing, as was the most recent ABA evaluation. Mother declined to testify about the medical issues she is having that would justify the exception respite care. Dr. Himber testified to not having current medical records. On the other side, Mother complained that the Service Agency constantly demands evidence to support some requests for services.

Other Matters

26. Mother testified that if Claimant received the personal assistant services, she would accompany Claimant and the assistant into the community. It appears she contemplates doing the same with a trainer.

27. Claimant's Uncle pointed to the boy's speech and language problems as interfering with his progress, and he pointed to a letter from an audiologist which stated Claimant has problems understanding communication when there is noise present. The letter further stated that Claimant has normal hearing sensitivity but has trouble listening when there is noise present. Claimant also demonstrated "Output/Organization Deficit." Persons with such deficits have difficulty performing auditory tasks that require more than three critical elements. They have trouble acting on incoming auditory information. Children with this deficit are usually disorganized, impulsive, and poor planners. Recommendations for his school included breaking information into smaller units, with tag words, providing instructions or directions one step at a time, and to also use visual or written instructions. (Ex. CL 23.)

28. Mother and Uncle noted that Claimant's doctors and others have recommended he needs support, and the use of small steps for him to comprehend what is to be modeled for Claimant.

29. Mother wants Claimant to be integrated into the community, and to move towards independence. While she takes him into the community on the weekends, she wants assistance in those situations, to help him integrate into the community.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Lanterman Act governs this case. (Welf. & Inst. Code, §§ 4500 et seq.) A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the service agency's decision. Claimant, through Mother, timely requested a fair hearing and jurisdiction for this case was established. (Factual Findings 1-4.)

2. When one seeks government benefits or services, the burden of proof is on him. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) The standard of proof in this case is a preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) Preponderance of the evidence means evidence that has more convincing force than that opposed to it. (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324.) Thus, Claimant bears the burden of proving he is entitled to the services.

Legal Principles

3. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The Lanterman Act mandates that an "array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community." (§ 4501.) These services and supports are provided by the state's regional centers. (§ 4620, subd. (a).)

4. A regional center is required to secure the services and supports that meet the needs of the consumer, as determined in the consumer's IPP. (§ 4646, subd.

(a)(1).) The determination of which services and supports are necessary for each consumer shall be made through the IPP process. (§ 4512, subd. (b).) The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by IPP participants, the effectiveness of each option in meeting the goals stated in the IPP, and the cost-effectiveness of each option. (*Ibid.*)

5. Services provided under the Lanterman Act are to be provided in conformity with the IPP, per section 4646, subdivision (d). Consumer choice is to play a part in the construction of the IPP. Where the parties cannot agree on the terms and conditions of the IPP, a Fair Hearing decision may, in essence, establish such terms. (See § 4710.5, subd. (a).)

6. The planning process for an IPP shall include “[g]athering information and conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities. . . . Assessments shall be conducted by qualified individuals and performed in natural environments whenever possible.” (§ 4646.5, subd. (a)(1).) Given that services must be cost effective and designed to meet the consumer’s needs, it is plain that assessments must be made so that services can be properly provided in a cost-effective manner.

7. (A) Section 4512, subdivision (b), defines “services and supports for persons with developmental disabilities” broadly, as meaning

specialized services and supports or special adaptations of
generic services and supports directed toward the

alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of an independent, productive, and normal life.

(B) Section 4512, subdivision (b), provides a list of services that may be provided, in appropriate circumstances, to a consumer of regional center services. The services and supports that may be provided are not limited to those set out in the statute. The list is extensive, running the gamut from diagnosis to advocacy to supported and sheltered employment to paid roommates.

(C) As noted hereafter, other statutes, and regulations, may impinge upon the provision of the services set out in section 4512, subdivision (b). One rule that can limit the obligation of a regional center to provide these services is the general rule that the regional centers may not supply services and supports available from generic services.

8. When purchasing services and supports for a consumer, a regional center shall ensure the following: (1) conformance with the regional center's purchase of service policies, as approved by the Department of Developmental Services pursuant to section 4434, subdivision (d); (2) use of generic services and supports when appropriate; (3) use of other services and sources of funding as contained in section 4659; and (4) consideration of a family's responsibility for providing similar services and supports for a minor child without disabilities. (§ 4646.4, subd. (a).)

9. Regional center funds "shall not be used to supplant the budget of any agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services." (§ 4648, subd. (a)(8).)

10. Regional centers are required to identify and pursue all possible sources of funding for consumers receiving regional center services. Such sources of funding include governmental entities or programs required to provide or pay for the cost of providing services, such as Medi-Cal, and private entities, to the extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer. (§ 4659, subd. (a)(1), (2).)

Analysis

11. The Act calls for an array of services to be provided so as to assist developmentally disabled people to be as independent as possible, and to be integrated into the community. (§§ 4640.7, 4646.5, subd. (2), 4648, subd. (a)(1) & (a)(2).) However, the ability of the regional centers to provide services is delimited by the need to provide cost effective services compliant with service policies and to explore other sources of services, such as generic services or insurance. The regional centers are not required to provide funding for every requested service, so as to preserve resources. A fair reading of the law is that a regional center is not required to meet a disabled person's every possible need or desire, in part because it is obligated to meet the needs of many people and families. The limitations on the provision of services by the regional centers impact this case.

12. The request for a personal trainer shall be denied. A personal trainer does not appear to fit within the definition of services under section 4512, subdivision (b), as it does not appear to be a specialized service. Further, there are numerous ways for Claimant to exercise, such as walking, the basketball he has participated in for two years, or some other organized activity. It has not been shown that his school program fails to provide for physical education; Claimant should seek adaptive physical education from his district. The Service Agency's argument that parents of non-

disabled children must provide opportunities for play and exercise to such children is well taken. Finally, it must be noted that Claimant has not articulated, in this hearing, just how the personal trainer's services would be utilized. If they would be used in a gym setting, there is the issue of providing such a setting. If in the community, such as at a park, the issues of elopement and other behavioral problems become an issue, the same issue raised in connection with use of personal assistants in the community.

13. The personal assistant request shall be denied. Mother's and Uncle's desire to integrate Claimant into the community is a good one, and the Act favors community integration, as noted above. However, this request tends to conflict with the Service Agency's definition of personal assistance, and the issue raised by it, that such a person should have training in responding to behavioral issues. Further, the personal assistants utilized by RCOC do not have training in such matters. Claimant has an opportunity to participate in a social skills group, assuming CalOptima will authorize the services.

14. The Service Agency shall provide funding for a social recreation program at OCCTAC, subject to availability with that provider.

15. The denial of the personal assistant request is without prejudice to a request for behavioral respite services to assist Mother in her efforts to bring Claimant further into the community. However, some assessment must be made by the Service Agency, and it must be in a position to communicate with any ABA Therapy provider obtained through insurance or Medi-Cal. Experience teaches that ABA services should be coordinated if there is more than one provider, for Claimant's benefit.

16. (A) Mother should be aware that failing to cooperate in assessments, and withholding relevant information from the Service Agency, may become a bar to the

provision of services. As noted in Legal Conclusion 6, assessments are a necessary part of the IPP process. It is difficult for a regional center to discharge its duties to make assessments if it is denied pertinent information. Where a person seeks benefits from a regional center, they bear the burden of providing information, submitting to reasonable exams and assessments, and cooperating in the planning process. (See Civ. Code, § 3521.)

(B) Further, a consumer's request for services essentially waives objection to the regional center and its staff and consultants having access to otherwise private information when such access/information is needed to assess the need for services and/or the effectiveness of those services. That does not mean, of course, the information can otherwise be disseminated for any other purpose. Thus, a consumer must cooperate with reasonable requests for assessments and evaluations, to assist the regional center in discharging its responsibility. And the regional center must be responsible in its use of the information.

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ORDER

Claimant's appeal of the denial of his request for personal assistants and a personal trainer is denied.

The Service Agency shall fund one social recreation program at OCCTAC.

DATE:

JOSEPH D. MONTOYA

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. Each party is bound by this decision. Either party may request a reconsideration pursuant to subdivision (b) of Welfare and Institutions Code section 4713 within 15 days of receiving the decision, or appeal the decision to a court of competent jurisdiction within 180 days of receiving the final decision.